THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION NO.17736 OF 2006

Dated: 27th October, 2006.

Between :

Kolla Nageswara Rao .. Petitioner

And

The Commissioner of Prohibition & Excise,
Government of Andhra Pradesh, Hyderabad,
And others. .. Respondents

THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION NO.17736 OF 2006

ORDER :

This writ petition is filed seeking a declaration that the order of the 1st respondent-Commissioner of Prohibition and Excise, dated 21.8.2006 granting permission to the 4th respondent for shifting his A4 shop from Ward No.21 to Ward No.11 of Bhimavaram town as arbitrary and illegal.

The District Collector, West Godavari District, issued a notification dated 27.5.2006 inviting bids for auction of grant of licence to sell Indian Made Foreign Liquor by Shop under Rule 5 of the Andhra Pradesh Excise (Lease of Right of Selling by Shop and Conditions of Licence) Rules, 2005 (for short "the Rules"). So far as Bhimavaram Municipality is concerned, 20 shops were notified, which were shown at Sl.Nos.41 to 60 of the notification. Both the writ petitioner and the 4th respondent had participated in the auction. Whereas the petitioner was declared as the successful bidder in respect of the shop shown at Sl.No.51 of the notification, situated in Ward No.16, the 4th respondent was the successful bidder in respect of the shop situated in Ward No.21. Accordingly, the petitioner was granted a licence in respect of the shop situated in Ward No.16. However, the 4th respondent seems to have made an application to the 1st respondent seeking permission for shifting his shop from Ward No.21 to Ward No.11. Having come to know about the same, the petitioner made several representations bringing to the notice of the 1st respondent that the shifting as sought by the 4th respondent, if permitted, would vitally affect his business. In spite of the same, the 1st respondent passed the impugned order dated 21.8.2006 according permission to the 4th respondent for shifting the shop from Ward No.21 to Ward No.11 of Bhimavaram town, subject to payment of shifting fee. Aggrieved by the same, this writ petition is filed contending *inter alia*, that the impugned order is not only arbitrary and illegal, but also not in conformity with the provisions of the Rules.

On behalf of respondents 1 to 3, the Prohibition & Excise Superintendent, Bhimavaram, filed a counter-affidavit stating that the 4th respondent after obtaining licence in respect of the shop notified at Sl.No.48 in Ward No.21, made an application stating that the owner of the premises had let out the premises only temporarily and that apart, since the average sales at the licensed premises was very low being only Rs.2,000/- per day, he would sustain loss if the business is continued in the said premises. Since he could not shift his shop to any other premises within the same Ward, he made a request to consider shifting of the shop to Ward No.11, wherein there is no notified shop. The writ petitioner filed an objection petition stating that the premises wherein the 4th respondent proposed to shift the licensed shop would be within the prohibited area from the existing Schools, Colleges, Hospitals and Churches. He also contended that the licensee for the year 2005-06 in respect of Ward No.21 had carried out a flourishing and profitable business and that the plea of the 4th respondent that the sales at Ward No.21 are very low is incorrect. He further contended that the proposed shop of the 4th respondent would be very near to his shop, situated in Ward No.16 and, therefore, the proposed shifting would adversely affect his business. Pursuant to the said objection petition, necessary enquiry was made and it was found that no educational institutions, Hospitals, Hostels and Churches etc., were situated within 100 meters of the newly proposed premises. The plea of the petitioner that the proposed shifting of the shop to Ward No.11 would result in heavy loss to his business at Ward No.16 was also found to be without any basis. Accordingly, the Deputy Commissioner of Prohibition and Excise recommended for shifting and pursuant thereto the impugned order was passed according permission to the 4th respondent to shift his shop from Ward No.21 to Ward No.11, which is permissible as per the amended Rule 29(3) of the Rules.

A separate counter-affidavit has been filed by the 4th respondent contending that the petitioner who is a licensee in respect of Ward No.16 cannot have any grievance with regard to shifting of shop from Ward No.21 to Ward No.11. It is also stated that objections raised by the petitioner were without any basis and are untenable and that the 1st respondent in exercise of his lawful authority under Rule 29(3) of the Rules permitted the 4th respondent to shift the shop for valid reasons.

I have heard the learned counsel for both the parties and perused the material on record.

Rule 29 of the Rules, which provides for shifting of the licensed premises as it stood initially under G.O.Rt.No.998 dated 24.5.2005 runs as under:

29.Sale permitted at the licensed premises only:-

(1) The leaseholder shall sell the liquor only at the premises specified in the licence.

(2) No change or alteration of the licensed premises shall be made nor the licensed premises shifted elsewhere.

*(3) Shifting of the licensed premises may be permitted for valid reasons and subject to conditions as may be specified by the Commissioner of Proh. & Excise within the **same area/locality** where it was originally established subject to payment of Rs.10,000/- as fee."*

Subsequently, by G.O.Ms.No.1878, Revenue (Ex.II) Department, dated 8-11-2005, sub-rule (3) of Rule 29 was substituted as under:

"(3) Shifting of the licensed premises may be permitted for valid reasons and subject to conditions as may be specified by the Commissioner of Prohibition & Excise, subject to payment of Rs.10,000/-."

There was yet another amendment to sub-rule (3) of Rule 29 vide G.O.Ms.No.598 dated 26.5.2006 thereby inserted a provision as under:

"(3) *Shifting of the licensed premises may be permitted for valid reasons within the notified area and subject to conditions as may be specified by the Commissioner subject to payment of one per cent of the lese amount or Rs.25,000/- whichever is higher;*

Provided that the Commissioner may consider and permit for valid reasons shifting of the licensed premises, notwithstanding the notified area of the licensed premises, within the same Mandal or Municipality or Municipal Corporation, without affecting the total number of notified shops in the said Mandal or Municipality or Municipal Corporation subject to condition as specified by the Commissioner and subject to payment of one percent of lease amount or Rs.25,000/- whichever is higher".

Thus, as per sub-rule (3) of Rule 29, as it stands with effect from 26.5.2006, the Commissioner is competent to consider and permit shifting of the licensed premises for valid reasons without regard to the notified area of the licensed premises. However, shifting shall be within the same Mandal or Municipality or Municipal Corporation without affecting the total number of notified shops in the said Mandal or Municipality or Municipal Corporation.

In the light of the above provision, the learned Government Pleader for Prohibition & Excise appearing for respondents 1 to 3 and the learned counsel appearing for the 4th respondent submitted that since shifting of the licensed premises permitted under the impugned order was within the same Municipality (Bhimavaram Municipality) and since the same does not effect the total number of notified shops in Bhimavaram Municipality, the impugned order does not suffer from any infirmity.

On the other hand, the learned counsel for the petitioner contended that since the power under sub-rule (3) of Rule 29 of the Rules can be exercised only **for valid reasons**, which must be in consonance with the provisions of the Act, the impugned order according sanction for shifting without assigning any reasons, much less valid reasons, is illegal and liable to be set aside on that ground alone. While placing reliance upon the decision of this Court in W.P.No.26957 of 2005 dated 25.4.2006, the learned counsel further contended that the permission granted under the impugned order for shifting of shop from Ward No.21 to Ward No.11 which was not notified in the initial notification runs contrary to the purport and object of the

Rules and, therefore, the impugned order is arbitrary and illegal.

The validity of Rule 29(3) of the Rules, as amended by G.O.Ms.No.1878 dated 8.11.2005 was questioned in W.P.No.26957 of 2005 contending that the same was *ultra vires* the legislative competence of the State under Section 72 of the A.P. Excise Act, 1968 (for short "the Act"). It was contended that the impugned Rule conferred unguided and unfettered power on the Commissioner to permit shifting of retail shop, which would amount to taking away the vested right of existing retail licensees. This Court having considered all the relevant aspects, though declined to hold that Rule 29 (3) was *ultra vires* the legislative power under Section 72 of the Act or unconstitutional, and that any unguided or unfettered powers were conferred on the Commissioner of Prohibition and Excise, held that on a combined reading of Rules 3,4 and 5 of the rules, lease of right to sell liquor by shop by way of public auction can be granted only in respect of shops fixed by the Commissioner of Prohibition and Excise in the particular area/locality identified by him in the notification and, therefore, the power conferred under sub-rule (3) of Rule 29 cannot be interpreted as empowering the Commissioner to permit shifting of the shop to a locality/area other than that was identified by the Commissioner in the notification. It was also held as under:

> "The deletion of the words '**within the same area/locality where it was originally established**' by itself did not render the power conferred on the Commissioner of Prohibition & Excise, arbitrary or unguided. However, in a given case if the authority is found to have exercised his discretion contrary to the scheme enunciated under Rules 3, 4 and 5 of the Rules, such decision can be struck down as arbitrary and illegal."

It is to be noted that subsequent to the said order in W.P.No.26957 of 2005, sub-rule (3) of Rule 29 of the Rules was amended by G.O.Ms.No.598 dated 26.5.2006 inserting the proviso, which was extracted above. As already noted, the proviso empowers the Commissioner to permit shifting of the licensed premises within the same Mandal or Municipality or Municipal Corporation notwithstanding

the notified area of the licensed premises. The said amendment came into force w.e.f. 26.5.2006, whereas the notification inviting tenders for auction of grant of lease by shop under Rule 5 of the Rules was issued subsequently on 27.5.2006. Hence, all the participants in the auction are bound by the amended rule and having participated in the auction without raising any objection, it is not open to them now to contend that the shifting of the shop from one Ward to another Ward would affect their business. So long as shifting is not effected within the Mandal or Municipality or Municipal Corporation and is not in violation of the other conditions specified under the proviso to rule 29(3), the petitioner cannot have any grievance. It is relevant to note that the validity of Rule 29(3), as amended by G.O.Ms.No.598 dated 26.5.2006, is not under challenge in this writ petition, but only the order passed in exercise of the said power is sought to be declared as arbitrary and illegal. Having regard to the power conferred under Rule 29(3), as it stood by the date of notification dated 27.5.2006, I am unable to hold that the impugned order dated 21.8.2006 is arbitrary or illegal on any of the grounds urged in the writ petition.

The record placed before this Court by the learned Government Pleader for Prohibition & Excise reveals that the impugned order was passed by the 1st respondent after adverting to the reports of the respondents 2 and 3 recommending shifting of the licensed premises from Ward No.21 to Ward No.11. Hence, the allegation that the impugned shifting was not for valid reasons is unfounded. The mere fact that reasons were not mentioned in the impugned order by itself does not vitiate the impugned proceedings having regard to the nature of the proceedings under challenge.

For the aforesaid reasons, I am unable to hold that the impugned order suffers from any infirmity and the writ petition is accordingly, dismissed. No costs.

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G. ROHINI, J.

27th October, 2006.
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